STATE OF MICHIGAN

COURT OF APPEALS

ROY FOSTER,

Plaintiff-Appellant,

v

BISHOP INTERNATIONAL AIRPORT AUTHORITY,

Defendant-Appellee.

UNPUBLISHED
September 9, 2003

No. 239267
Genesee Circuit Court
LC No. 01-069524-CZ

Before: Jansen, P.J., and Neff and Kelly, JJ.

PER CURIAM.

In this reverse race discrimination and age discrimination case, plaintiff appeals as of right the trial court's order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm.

I. Standard of Review

We review de novo the trial court's ruling on a motion summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

II. Reverse Race Discrimination

The trial court did not err in granting defendant's motion for summary disposition of plaintiff reverse race discrimination claim because plaintiff failed to present direct evidence of discrimination or establish a prima facie case with indirect evidence.

A. Direct Evidence

The statement "Roy they're looking for a black," made by William Sandifer, the deputy airport director and plaintiff's supervisor, is not direct evidence of reverse race discrimination because Sandifer was not the decisionmaker involved in hiring Christopher Miller instead of plaintiff for the public safety director's position.[1] Direct evidence is evidence that, if believed,

[1] The record reflects that there were between eighteen and twenty-four applicants for the (continued…)

requires the conclusion that unlawful discrimination was at least a motivating factor. *Harrison v Olde Financial*, 225 Mich App 601, 610; 572 NW2d 679 (1997). Because the statement was not made by a decisionmaker, it does not constitute direct evidence that unlawful discrimination was a determining or motivating factor in defendant's decision to hire Miller. *Id*. at 608 n 7, 610.

Similarly, the deposition testimony of airport director James Rice and Sandifer that defendant generally considers diversity when hiring is not direct evidence of reverse race discrimination because it does not "require the conclusion that unlawful discrimination was a motivating factor" in the decision to hire Christopher Miller.

B. Indirect Evidence

Viewing the evidence in a light most favorable to plaintiff, the nonmoving party, we conclude that plaintiff did not establish a prima facie case by indirect evidence. The first three elements are not disputed. Plaintiff was a member of a protected class on the basis of his race. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001). Plaintiff was subject to an adverse employment decision because he was not hired for the position. *Id.* Plaintiff was qualified for the position. *Id.*

But with respect to the fourth element, plaintiff failed to present evidence from which a jury could infer unlawful discrimination in the decision to hire Miller instead of plaintiff. *Id.* at 463, 468. Plaintiff argues that the following evidence allows an inference of unlawful discrimination: (1) Miller did not satisfy the first job posting's requirement of emergency medical technician (EMT) certification; (2) the job description was revised, eliminating the EMT certification requirement; and (3) even under the revised requirements, plaintiff had more relevant experience than Miller. It is undisputed that the job requirements were changed and only when they were changed, was Miller qualified. But the fact that the requirements were changed, in and of itself, does not raise an inference of unlawful discrimination. Furthermore, although the evidence showed plaintiff was more qualified than Miller, it would not allow a jury to infer unlawful discrimination because both candidates were qualified. "As a matter of law, an inference of unlawful discrimination does not arise merely because an employer has chosen between two qualified candidates." *Id.* at 471. Because plaintiff failed to establish a prima facie case of reverse race discrimination, the trial court did not err in granting defendant's motion for summary disposition of plaintiff's reverse race discrimination claim.

III. Age Discrimination

The trial court also did not err in granting summary disposition of plaintiff's age discrimination claim. Plaintiff argues that he presented direct evidence of race discrimination in that Rice questioned plaintiff, who was sixty-three years old at the time, regarding his plans for retirement.[2] This question occurred after plaintiff was told he was the leading candidate, but before the hiring decision was made. Rice admitted that plaintiff's retirement plans were a

(…continued)

position. Of the three applicants already employed in the public safety department, only plaintiff and Miller were interviewed.

[2] Plaintiff does not argue that his claim was based on indirect evidence.

concern for him because he did not want to invest time and money in a new director and then have the person leave shortly after being trained. Defendant's question expressed a legitimate interest in plaintiff's retirement plans. This is not direct evidence of unlawful conduct. See, e.g., *Shorette v Rite Aid of Maine, Inc*, 155 F3d 8, 13 (CA 1, 1998) (rejecting age discrimination claim where district manager asked plaintiff's age and when he planned to retire); *Closi v Electri-Flex Co*, 965 F2d 500, 502 (CA 7, 1992) (inquiries about an employee's retirement plans did not constitute direct evidence of age discrimination). Because plaintiff failed to present any evidence of age discrimination, the trial court did not err in granting summary disposition of this claim.

Affirmed.

/s/ Kathleen Jansen
/s/ Janet T. Neff
/s/ Kirsten Frank Kelly